*UNITED STATES DISTRICT COURT*

*DISTRICT OF MAINE*

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| ***REED & REED, INC., et al.,*** | ***)*** | |
| | ***)*** | |
| ***Plaintiffs*** | ***)*** | |
| | ***)*** | |
| ***v.*** | ***)*** | |
| | ***)*** | |
| ***WEEKS MARINE, INC.,*** | ***)*** | |
| | ***)*** | |
| ***Defendant/Third-Party Plaintiff*** | ***)*** | |
| | ***)*** | |
| ***v.*** | ***)*** | ***Docket No. 02-195-P-H*** |
| | ***)*** | |
| ***GUY F. ATKINSON CONSTRUCTION CORPORATION, d/b/a ATKINSON CONSTRUCTION,*** | ***)*** | |
| | ***)*** | |
| ***Defendant/Third-Party Defendant/ Fourth-Party Plaintiff*** | ***)*** | |
| | ***)*** | |
| ***v.*** | ***)*** | |
| | ***)*** | |
| ***CALLAHAN BROTHERS, LLC,*** | ***)*** | |
| | ***)*** | |
| ***Fourth-Party Defendant*** | ***)*** | |

## *RECOMMENDED DECISION ON MOTIONS FOR SUMMARY JUDGMENT*

The plaintiffs and original defendant in this multi-party action bring cross-motions for summary judgment. The fourth-party defendant brings a motion for summary judgment on the fourth-party complaint and the third-party defendant brings a motion for partial summary judgment on the third-party complaint and

one of the counts of the complaint asserted against it. With one adjustment, *see* footnote 1, I recommend that the motions be denied.

## I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp*., 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

To the extent that parties cross-move for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2720, at 336-37 (1998).

## II. Factual Background

The following undisputed material facts are appropriately presented in the parties' respective statements of material facts submitted pursuant to this court's Local Rule 56. Each of the facts set forth is relevant to one or more of the pending motions.

On or about August 11, 1998, Clark Builders of Maine, LLC ("Clark") entered into a construction agreement with Bath Iron Works Corporation ("BIW") for the construction, among other things, of a land-level transfer facility in Bath, Maine ("the BIW contract"). Atkinson's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment ("Atkinson SMF") (Docket No. 32) ¶ 1; Response of Defendant, Weeks Marine, Inc. to Atkinson's Statement of Undisputed Material Facts ("Weeks's Atkinson Responsive SMF") (Docket No. 47) ¶ 1.[1] On or about August 11, 1998 Clark entered into a construction subcontract with The Clark Construction Group, Inc. ("Clark Construction") pursuant to which Clark Construction agreed to perform the construction services required by the BIW contract. *Id.* ¶ 2. Also on

[1] One of the two plaintiffs, Reed & Reed, Inc., filed a "response" to Atkinson's statement of material facts. Reed & Reed, Inc.'s Response to Guy F. Atkinson Construction Corporation's Statement of Undisputed Material Facts (Docket No. 44). However, Atkinson moved for summary judgment against the plaintiffs only on Count IV of the amended complaint, Atkinson's Motion for Summary Judgement [sic] (Docket No. 31), and the plaintiffs in response withdrew that count, Reed & Reed, Inc.'s Response to Guy F. Atkinson Construction Corporation's Motion for Summary Judgment (Docket No. 43) at 1. (Counsel for the plaintiffs has confirmed that he intends documents filed only in the name of Reed & Reed to (*continued on next page*)

or about August 11, 1998 Clark Construction entered into a subcontract with third-party defendant Guy F. Atkinson Construction Corporation ("Atkinson") pursuant to which Atkinson agreed to perform a portion of the construction services set forth in the Clark subcontract. *Id.* ¶ 3. On or about September 21, 1998 Atkinson entered into a subcontract ("the Weeks Subcontract") with defendant Weeks Marine, Inc. ("Weeks") to perform certain of Atkinson's work on the Bath Iron Works Land Level Transfer Facility. *Id.* ¶ 4. On or about March 15, 1999 Atkinson entered into a subcontract ("the Callahan subcontract") with fourth-party defendant Callahan Brothers, LLC ("Callahan") to perform certain of Atkinson's work on the project. Fourth-Party Defendant Callahan Brothers, LLC's Statement of Undisputed Material Facts, etc. ("Callahan SMF") (Docket No. 52) ¶ 2; Guy F. Atkinson Construction Corporation's Opposing Statement of Material Facts in Response to Fourth-Party Defendant Callahan Brothers, LLC's Statement of Undisputed Material Facts, etc. ("Atkinson Responsive SMF") (Docket No. 64) ¶ 2.

On October 11, 2000 a Weeks barge went aground on and caused damage to the marine landing ways involved in the project. Atkinson SMF ¶ 8; Weeks's Responsive SMF ¶ 8. Immediately after this incident, Weeks took the position that it occurred because of the acts or omissions of others. *Id.* ¶ 9. Atkinson has consistently denied that it was in any way responsible for this incident. *Id.* ¶ 10. Following the incident, Atkinson provided compensation for certain work performed under the Weeks Subcontract; in turn, Weeks executed a document entitled "Final Release and Waiver of Lien" dated January 2, 2001. *Id.* ¶ 11. This document was executed by Gary A. Platt, senior vice-president of Weeks. Guy F. Atkinson Construction Corporation's Statement of Additional Material Facts ("Atkinson Additional SMF") (included in Atkinson Responsive SMF beginning at 2) ¶ 7; Fourth-Party Defendant Callahan Brothers, LLC's Reply

represent plaintiff St. Paul Fire & Marine Insurance Company as well. Letter dated January 22, 2004 (Docket No. 80).)
(*continued on next page*)

in Support of Its Statement of Undisputed Material Facts ("Callahan Reply") (Docket No. 67) (admitting all statements included in Atkinson's statement of additional material facts). Although this document states that the release was in consideration of $1,265,550, Atkinson had not in fact paid that entire sum as of January 2, 2001. Defendant Weeks' Statement of Material Facts ("Weeks's Second SMF") (included in Weeks's Atkinson Responsive SMF, beginning at 3) ¶ 4.[2]

Plaintiff St. Paul Fire and Marine Insurance Company ("St. Paul") reimbursed Reed in the amount of $369,061 for all of the damages claimed in this lawsuit as a result of the alleged damage to the ways. Atkinson Additional SMF ¶ 8; Callahan Reply. Reed brought suit against Weeks seeking compensation for the damage; Weeks in turn filed a third-party complaint against Atkinson; and Atkinson in turn filed a fourth-party complain against Callahan. *Id*. ¶¶ 9-10. St. Paul intervened in this action and St. Paul and Reed subsequently brought claims against Atkinson and Weeks. *Id*. ¶ 11.

Callahan also entered into a subcontract with Reed ("the Reed subcontract"). Defendant Weeks Marine, Inc.'s Statement of Material Facts ("Weeks SMF") (Docket No. 27) ¶ 9; Plaintiff Reed & Reed, Inc.'s and St. Paul Fire & Marine Insurance Company's Opposing Statement of Material Facts in Dispute ("Plaintiffs' Responsive SMF") (Docket No. 39) ¶ 9. The president of Callahan, who signed both the Callahan subcontract and the Reed subcontract, was also the president of Reed. *Id*. ¶ 11. Reed had notice of the Callahan subcontract. *Id*. ¶ 23.

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Leave to withdraw that count of the amended complaint is hereby granted.

[2] Atkinson's response to this paragraph of Weeks's second statement of material facts is the following: "Atkinson is not yet able to admit, deny or qualify this statement of fact as this alleged fact is still being investigated." Guy F. Atkinson Construction Corporation's [Amended] Reply to Defendant Weeks' Statement of Material Facts ("Atkinson's Weeks Responsive SMF") (Docket No. 76) ¶ 4. This response is not appropriate; pursuant to Local Rule 56(e), this paragraph of the Weeks statement of material facts will be deemed admitted. If Atkinson was truly unable to admit, deny or qualify this paragraph because it needed more discovery in order to do so, its recourse was to file a motion under Fed. R. Civ. P. 56(f). It may not avoid its obligations under the local rule through the expedient it has chosen here and in its responses to paragraphs 6 and 7 of the Weeks statement of material facts.

## III. Discussion

### A. Cross-Motions of Plaintiffs and Weeks

The operative amended complaint asserts claims against Weeks for negligence and breach of implied contract. Amended Complaint (Docket No. 19) ¶¶ 29-37. Weeks contends that Reed[3] waived the claims it now asserts. Defendant Weeks Marine, Inc.'s Motion for Summary Judgment, etc. ("Weeks Motion") (Docket No. 26) at 6-9. The plaintiffs seek summary judgment "dismissing the waiver and release defense of Weeks." Reed & Reed, Inc.'s and St. Paul Fire & Marine Insurance Company's Response and Objection to Weeks Marine, Inc.'s Motion for Summary Judgment and Memorandum in Support of Reed & Reed, Inc.'s and St. Paul's Motion for Summary Judgment ("Plaintiffs' Opposition") (Docket No. 38) at 19. If the plaintiffs' motion is properly considered to seek summary judgment at all, it should be characterized as one seeking partial summary judgment.

Weeks bases its argument on terms that it contends are included in the Callahan subcontract and the Reed subcontract. The subcontract between Callahan and Atkinson includes the following term:

> Prior to commencing the work, Subcontractor shall procure . . . and thereafter maintain, at its own expense, until expiration of Subcontractor's obligations under the Subcontract, insurance coverage from insurers acceptable to Atkinson in such amounts and in such form as required by Exhibit E.

Atkinson Construction Subcontract Agreement No. 17001-0112 (Exh. 4 to Deposition of James C. Cooney) § 7.a. Exhibit E to this subcontract, titled "Insurance" and subtitled "Insurance Requirements for

[3] From all that appears in the pleadings and submissions associated with the pending motions, St. Paul's claims are identical to those of Reed. References to Reed in this recommended decision should be considered to be references to both plaintiffs unless otherwise indicated.

Subcontractors of Any Tier Who Are Enrolled in the Owner Controlled Insurance Program," includes the following language:

> 10. Waiver of Subrogation – To the extent that a loss is covered by insurance in force, and recovery is made for such loss, the BIW and Contractor and Subcontractor's [sic] hereby mutually release each other from liability and waive all rights of subrogation and all rights of recovery against each other for any loss insured against under their respective policies (including extended coverage), no matter how caused, it being understood that the damaged party will look solely to its insurer for reimbursement. BIW shall required all Subcontractors to similarly waive their rights of subrogation in each of their respective construction contracts with respect to the work.

Exh. E to Atkinson Construction Subcontract Agreement No. 17001-0112, at 3-4; Weeks SMF ¶ 2.[4] Exhibit E also provides that "Contractor's and Subcontractor's responsibilities shall include . . . Inclusion of the OCIP provisions in all subcontracts." Exh. E at 2; Weeks SMF ¶ 5.[5]

Weeks contends that the waiver-of-subrogation paragraph from Exhibit E was incorporated into Callahan's subcontract with Reed, the Reed subcontract, by the following language in that document:

> SUBCONTRACTOR certifies and agrees that he/it is familiar with all of the terms, conditions and obligations of all contract documents . . . and that the SUBCONTRACTOR will be bound by any and all contract documents insofar as they relate in any part or in any way, directly or indirectly, to the work covered by this agreement.
>
> * * *
>
> Except as modified by this Subcontract, Subcontractor agrees to adhere to and be bound to the Contractor by all of the provisions of the General Contract and to the contract documents affecting subcontractor's work hereunder, and, insofar as its work is concerned, to assume towards the Contractor all of the duties, obligations and liabilities that the Contractor assumes toward the Owner.

[4] The plaintiffs purport to deny this paragraph of Weeks's statement of material facts, but they deny only that this paragraph of Exhibit E became part of the Callahan subcontract. Plaintiffs' Responsive SMF ¶ 2.

[5] See n. 4 *supra*. Weeks refers to an additional purported term of the Callahan subcontract that refers to incorporation of provisions of that subcontract into lower-tier subcontracts. Weeks SMF ¶ 4. That language does not appear at the page cited in support of the paragraph, nor does it appear in Exhibit E as the plaintiffs assert in their response. Plaintiffs' Responsive SMF ¶ 4.

Weeks SMF ¶¶ 14-15; Plaintiffs' Responsive SMF ¶¶ 14-15. Weeks asserts that this waiver extends to claims by Reed against Weeks, even though Weeks is not a party to either subcontract, and that, because it is undisputed that Reed recovered from St. Paul for the damages arising out of the incident at issue, the plaintiffs may not recover from Weeks.[6] Weeks Motion at 6. *See generally Richmond Steel, Inc. v. Legal & Gen. Assurance Soc., Ltd.*, 821 F. Supp. 793, 800 (D. P.R. 1993) (waiver of subrogation in construction contract precludes insured party's insurer from bringing subrogation claim against one of parties to contract).

The plaintiffs argue in response that the section of Exhibit E on which Weeks relies was not incorporated into the Callahan subcontract, that Exhibit E did not extend by its terms to Reed, that Callahan and Reed demonstrated their intent not to waive subrogation in the Reed subcontract by deleting certain provisions from that subcontract, that Weeks lacks privity with either subcontract and therefore cannot claim to be protected by either, and that the subcontracts are ambiguous on the point at issue. Plaintiffs' Opposition at 9-18. I agree with the latter contention, making it unnecessary to consider the others.

The mere fact that Exhibit E was attached to the Callahan subcontract does not and cannot mean, as Weeks asserts without citation to authority, that it "was made a part of the Subcontract," making it

[6] This argument would not apply to Reed's "additional claim against Weeks for other damages that were not covered by insurance, including delay damages," Reed & Reed, Inc.'s and St. Paul Fire & Marine Insurance Company's Additional Facts ("Plaintiffs' Weeks SMF") (included in Docket No. 39 starting at 5) ¶19; *see also* Amended Complaint ¶ 27, and summary judgment would not be available in any event for that portion of the plaintiffs' claims. Weeks objects to paragraph 19, asking that it be stricken "for failure to comply with Local Rule 56, as it contains multiple factual allegations set forth in the same numbered paragraph" and because the portion of the paragraph at issue here "is conclusory and should not be considered for purposes of summary judgment [because i]t is not supported with the required 'particularized factual information." Defendant's [sic] Weeks Marine, Inc.'s Response to Plaintiffs' Statement of Additional Facts ("Weeks Responsive SMF") (Docket No. 54) ¶ 19. The motion to strike is denied; each of the factual assertions in paragraph 19 is supported by a citation to the summary judgment record and no undue burden is imposed on Weeks to respond to 3 related sentences rather than 1 in a single paragraph. The objection based on a lack of particularized factual information is moot because I conclude that Weeks is not entitled to summary judgment on the claim for which insurance coverage was available, as set forth *infra*. Weeks's response to the plaintiffs' statement of additional facts includes a purported "Statement of Additional Fact." *Id*. at 6-8. Such an additional statement is not contemplated by (*continued on next page*)

"unnecessary to state elsewhere in the Subcontract that Exhibit E was incorporated therein by reference." Defendant Weeks Marine, Inc.'s Reply Memorandum in Support of Its Motion for Summary Judgment and Objection to Plaintiffs' Cross-Motion for Summary Judgment, etc. ("Weeks Reply") (Docket No. 53) at 2. *See Topro Servs., Inc. v. McCarthy W. Constructors, Inc.*, 827 F. Supp. 666, 667-68 (D. Colo. 1993). Nor does the fact that the Callahan subcontract requires the subcontractor to obtain insurance coverage "in such form as required by Exhibit E" necessarily impose on the subcontractor all of the terms and conditions set forth in Exhibit E, as Weeks argues in the alternative. Weeks Reply at 2. Many of the terms set forth in Exhibit E are clearly irrelevant to a contract between Atkinson and Callahan. It is not readily apparent that the "form" of insurance coverage includes a waiver of subrogation.

If a contract is ambiguous, Maine law directs that interpretation of the contract is a question of fact; if the contract is unambiguous, interpretation is a question of law for the court. *Lee v. Scotia Prince Cruises Ltd.*, 828 A.2d 210, 213 (Me. 2003). The question whether a contract is ambiguous is itself a question of law. *Id.*; *Elliott v. S.D. Warren Co.*, 134 F.3d 1, 9 (1st Cir. 1998). "Contract language is ambiguous when it is reasonably susceptible of different interpretations." *Lee*, 828 A.2d at 213 (citation omitted). A court interpreting a contract must look at the whole instrument and construe it so as to give force and effect to all of its provisions. *American Prot. Ins. Co. v. Acadia Ins. Co.*, 814 A.2d 989, 993 (Me. 2003). Language in a contract should be given its plain meaning. *Id*. Here, Weeks asserts that any reading of this phrase other than that which it proposes "would mean that express terms in the Subcontract had no meaning or purpose, which would be absurd," Weeks Reply at 2, but it does not identify any such express terms, and none is readily apparent from my reading of the subcontract.

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Local Rule 56 and I have not considered it.

The term "in such form as required by Exhibit E" in the Callahan subcontract is reasonably susceptible of different interpretations. It could be interpreted to import all of the terms of Exhibit E into the subcontract, but it could also be interpreted to refer only to certain terms of Exhibit E, those which refer to "form," however that word is to be defined. Exhibit E itself provides some guidance; for example, it is titled "Insurance Requirements for Subcontractors of Any Tier Who Are Enrolled in the Owner Controlled Insurance Program," and, while Weeks contends in its memorandum that Callahan was so enrolled,[7] Reed apparently was not. Plaintiffs' Weeks SMF ¶ 8; Weeks Responsive SMF ¶ 8. But it is also possible that the requirement that "OCIP provisions" be included in each subcontract somehow overrode the fact that some subcontractors might not be enrolled in the OCIP. This question cannot be determined from the plain language of the subcontracts themselves. The limited extrinsic evidence offered by the plaintiffs on the question of interpretation of the language of the subcontracts is itself disputed. Plaintiffs' Weeks SMF ¶¶11-13, 15, 20; Weeks Responsive SMF ¶¶ 11-13, 15, 20. Thus, although the question whether paragraph 10 of Exhibit E was incorporated by reference into the Callahan subcontract, a necessary prerequisite to all of Weeks's arguments, may be a question of law, *see Advanced Display Sys., Inc. v. Kent State Univ.*, 212 F.3d 1272, 1282-83 (Fed. Cir. 2000) (patent law), it is one that cannot be determined based on the summary judgment record. On the showing made, there are disputed issues of material fact concerning the question whether the subrogation waiver was included in the Callahan and Reed subcontracts and, if so, whether its protection extended to Weeks. Weeks is not entitled to summary

[7] Weeks Reply at 2. The court cannot consider this fact because it is not included in Weeks's statements of material facts.

judgment on this point, and the plaintiffs are not entitled to summary judgment removing the issue as a possible defense for Weeks. Both motions for summary judgment should be denied. *See generally GMAC Commercial Mortgage Corp. v. Gleichman*, 84 F.Supp.2d 127, 142-43 (D. Me. 1999).

**B. Atkinson's Motion**

Atkinson seeks summary judgment on all claims asserted against it by Weeks. Guy F. Atkinson Construction Corporation's Memorandum of Law in Support of Summary Judgment ("Atkinson Motion") (attached to Atkinson's Motion for Summary Judgment (Docket No. 31)) at 3. It contends that Weeks has released it from all such claims. *Id*. Weeks responds that the release at issue does not extend to the negligence it alleges, that the release is ambiguous, and that the parties' course of conduct and the custom of the trade demonstrate that the release was not intended to reach claims other than those for past work. Objection of Defendant Weeks Marine, Inc. to Atkinson's Motion for Summary Judgment ("Weeks Opposition") (Docket No. 46) at 5-10.

The release at issue here provides, in relevant part:

> IN CONSIDERATION of the sum of One million, Two Hundred, Sixty-five Thousand, Five hundred, Fifty Dollars ($1,265,550.-) paid to the undersigned GUY F. ATKINSON CONSTRUCTION COMPANY, hereinafter referred to as the "Contractor", as full and final payment for all work required of and performed by the undersigned for the Contractor on that certain project known as Bath Iron Works Land Level Transfer Facility located in Bath, Maine including, without limitation, all work performed under and in connection with Change Orders #12, #13, & #14 for P.O./Subcontract No. 17001-0101, dated September 21, 1998, together with all additions, supplements ~~and change orders~~ to and modification of said P.O./Subcontract, and all other work, if any, performed by the undersigned on said project,
>
> * * *
>
> The undersigned hereby releases and forever discharges the Contractor, the Owner (as defined and identified in said P.O./Subcontract) and all lands, improvements, chattels and other real and personal property connected with or a part of said project from any and all claims, demands, liens and claims of lien whatsoever arising out of said P.O./Subcontract and/or said work and which it

> now has or hereafter might or could have except the following (If there are no exceptions, write "None" in the following space). NONE; and
>
> This release and waiver of lien shall inure to the benefit of the Contractor, the Owner, and their respective successors and assigns and shall be binding upon the undersigned and its or their heirs, successors and assigns.

Atkinson SMF ¶ 12; Weeks's Atkinson Responsive SMF ¶ 12. The release also includes the following paragraph:

> The above releases, waivers and other provisions contained herein do not and are not intended to in any way release the Contractor, Owner, their respective successors and assigns, agents, attorneys, officers or employees from any claims arising or which may arise from the incident involving the Weeks Crane 663 which occurred on December 21, 2000.

*Id*. ¶ 13.

Weeks's argument concerning past work is without merit. The release at issue is dated January 2, 2001, well after the incident giving rise to the claim, which occurred on October 11, 2000. Weeks's assertion that "[t]he pending claims against Atkinson had not even accrued" at the time the release was signed, Weeks Opposition at 8, misstates the undisputed facts.[8]

The contention that the release does not reach any negligent conduct, *id*. at 5-6, is also without merit. Weeks first cites case law admonishing Maine courts to direct a heightened degree of scrutiny at contracts claimed to release a party from liability for its own negligence. *Id*. The release at issue here meets the requirements of that case law by plainly releasing Atkinson from any and all claims whatsoever arising

[8] Weeks's discussion of this point, Weeks Opposition at 8, is extremely brief. Its citation of *Cyr v. Michaud*, 454 A.2d 1376, 1385 (Me. 1983), suggests that it means to argue that its claims for indemnification and contribution had not yet accrued when the release was signed, because the Law Court held in *Cyr* that such claims do not accrue for purposes of the statute of limitations until a judgment has been paid by the third-party plaintiff. Even if that were the argument intended by Weeks, however, only Count III of its cross-claim raises such claims. Amended Answer, Affirmative Defenses, Counterclaim and Cross Claim of Weeks Marine, Inc. (Docket No. 12) at 13-14. As to such claims, the unambiguous language of the release includes claims arising after the date of the release, so long as those claims arise out of the subcontract or the work that is the subject of the subcontract.

out of the subcontract or the work. *See Lloyd v. Sugarloaf Mountain Corp.*, 833 A.2d 1, 4 (Me. 2003) (release must spell out with particularity intent of parties to extinguish negligence liability). The fact that a specific exemption for claims arising out of an incident that on its face appears to have involved possible negligence was added to the release also suggests that the release was intended to include claims of negligence. Weeks next asserts that "[t]he issue is controlled by *Forum Financial* [*Group v. President & Fellows of Harvard College*], 173 F.Supp.2d [72,] 104 [D. Me. 2001]." Weeks Opposition at 6. To the contrary, this court held in that case that a release of claims "specifically addressed to claims . . . in connection with the [c]ontract," 173 F.Supp.2d at 104 (citation and internal punctuation omitted), did not apply to claims for damages not based on the contract, *id*. at 104-05. Here, the release addresses claims arising our of the subcontract or the work covered by the subcontract, and there can be no dispute that the incident giving rise to Atkinson's claims arose out of work that was the subject of the subcontract.

Weeks also contends that, because there was no new consideration for the release in addition to the consideration specified in the release, which was for contractually-obligated payments,[9] and because all of the payment recited in the lease has not actually been paid, the release is invalid. Weeks Opposition at 10. Both of these arguments depend on material outside the language of the release itself. Extrinsic evidence may not be considered with respect to interpretation of contract terms when those terms are unambiguous. *Portland Valve, Inc. v. Rockwood Sys. Corp.*, 460 A.2d 1383, 1387 (Me. 1983). As discussed above, contract language is only ambiguous when it is reasonably susceptible of differing interpretations. The language of the release reciting payment is not ambiguous. Weeks may not avoid summary judgment on this basis.

[9] The only summary judgment material submitted in support of this factual assertion, Weeks's Second SMF ¶ 15, is (*continued on next page*)

Weeks's argument that the release is ambiguous because the entry of the word "NONE" at the end of the second paragraph quoted above, where space was provided for a list of claims exempted from the release, is inconsistent with the later paragraph specifically exempting all claims arising from a specific incident, Weeks Opposition at 7, also fails. Weeks contends, without citation to authority, that the fact that a reference to the incident with Weeks Crane 663 was included in the release may only be reconciled with the earlier entry of "NONE" by "recogniz[ing] that claims or potential claims for negligence, contribution or indemnification . . . were never intended to be encompassed by the release." *Id*. As I have already noted, the opposite conclusion is the more reasonable. In any event, the presence of the paragraph specifying an exemption from the release creates no ambiguity when considered together with the earlier entry of "NONE." Nothing in the release is rendered reasonably susceptible of differing interpretations by the inartful placement of the reference to the Crane 663 incident. *See generally Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 34-36 (1st Cir. 2001). Weeks takes nothing by this ambiguity argument.

The final argument offered by Weeks invokes the parties' course of dealing and customs of the trade. Weeks Opposition at 7-9. It contends that the parties intended the release at issue to apply only to "work previously performed and materials already supplied." *Id*. at 8. Atkinson first responds that, because the release is unambiguous, evidence of custom and usage may not be allowed to vary the terms of the contract. Guy F. Atkinson Construction Corporation's Reply to Defendant Weeks Marine, Inc.'s Objection to Atkinson's Motion for Summary Judgment (Docket No. 56) at 2. While this assertion is supported by the case cited by Atkinson, *Everett v. Rand*, 152 Me. 405, 413 (1957), that is not the end

disputed, Atkinson's Weeks Responsive SMF ¶ 19.

of the matter. The terms of the release would not necessarily be varied if they were interpreted to apply only to certain events or a certain period of time. *See generally Buckley v. Basford*, 184 F. Supp. 870, 872 (D. Me. 1960). "In interpreting a contract, a court may accept evidence of trade practice and custom. However, a court should accept evidence of trade practice only where a party makes a showing that it relied reasonably on a competing interpretation of the words when it entered into the contract." *Jowett, Inc. v. United States*, 234 F.3d 1365, 1368 (1st Cir. 2000) (citations and internal quotation marks omitted). "[T]he parties to a contract . . . can be their own lexicographers and . . . trade practice may serve that lexicographic function in some cases." *Id*.[10] This circumstance arose in *Jowett* in the context of the question whether there was a term in the contract at issue that had an accepted industry meaning different from its ordinary meaning. *Id*. at 1369.

Here, Weeks asserts that it was asked to signed earlier and subsequent releases identical to the one at issue when earlier and later payments were made under the subcontract, Weeks's Second SMF ¶¶ 2, 10, 19-21, 24, 26; Atkinson's Weeks Responsive SMF ¶¶ 2, 10, 19-21, 24-26, and that, "[i]n the construction industry, the relevant trade usage is to interpret releases as limited to claims for contract amounts that either have actually been paid or are about to be paid in exchange for the release," Weeks Opposition at 8-9. Atkinson disputes the factual assertions offered by Weeks in support of the latter contention. Weeks's Second SMF ¶¶ 11-12, 14; Atkinson's Weeks Responsive SMF ¶¶ 11-12, 14. These factual assertions tend to support Weeks's usage-of-trade argument, even though the argument is applied to an entire release rather than to a single term of a contract. Some support for such a broad application of the principle is found in the Restatement (Second) of Contracts, which provides:

[10] Contrary to Weeks's assertion, Weeks Opposition at 8, consideration of custom or usage of trade does *not* allow (*continued on next page*)

> (1) An agreement is interpreted in accordance with a relevant usage if each party knew or had reason to know of the usage and neither party knew or had reason to know that the meaning attached by the other was inconsistent with the usage.
>
> (2) When the meaning attached by one party accorded with a relevant usage and the other knew or had reason to know of the usage, the other is treated as having known or had reason to know the meaning attached by the first party.

Restatement (Second) of Contracts § 220 (1981). Comment *d* to this section provides:

> Language and conduct are in general given meaning by usage rather than by the law, and ambiguity and contradiction likewise depend upon usage. Hence usage relevant to interpretation is treated as part of the context of an agreement in determining whether there is ambiguity or contradiction as well as in resolving ambiguity or contradiction. There is no requirement than an ambiguity be shown before usage can be shown, and no prohibition against showing that language or conduct have a different meaning in the light of usage from the meaning they might have apart from the usage. The normal effect of a usage on a written contract is to vary its meaning from the meaning it would otherwise have.

*Id*., comment *d*.

The existence in the release of the specific exception for the incident involving the crane supports an interpretation contrary to that suggested by the evidence of course of dealing or usage of trade. While the Restatement formulation goes beyond the First Circuit's discussion of a specific term in a contract in *Jowett*, it is not necessarily inconsistent with that opinion, in which the parties raised only the issue of the meaning of a specific term. The material evidence conflicts on this issue, and that conflict is sufficient to prevent the entry of summary judgment for Atkinson based on the release. My recommendation on this point does not mean that Atkinson may not pursue a defense based on the release at trial.

### C. Callahan's Motion

consideration of an entirely separate agreement, here the subcontract itself.

Callahan seeks summary judgment on the claims asserted against it by Atkinson in the fourth-party complaint. Fourth-Party Defendant Callahan Brothers, LLC's Motion for Summary Judgment Against Fourth-Party Plaintiff Atkinson Construction, etc. ("Callahan Motion") (Docket No. 51) at 1. Specifically, Callahan contends that a release executed by Atkinson relieves it of any liability for the claims asserted against it by Callahan. *Id*. at 1-2. Atkinson responds that the release at issue does not benefit Callahan. Guy F. Atkinson Construction Corporation's Objection to Callahan Brothers, LLC's Motion for Summary Judgment ("Atkinson Opposition") (Docket No. 63) at 4.[11]

Callahan relies on a release that it executed in favor of Atkinson that was identical in its relevant language to the release at issue in Atkinson's motion for summary judgment against Weeks, discussed above, with the exception that the release at issue did not include the additional paragraph concerning the incident with Weeks Crane 663 that was part of the Weeks release. Callahan SMF ¶¶ 5-7; Atkinson Responsive SMF ¶¶ 5-7. Citing *Butters v. Kane*, 347 A.2d 602, 604 (Me. 1975), Callahan contends that the release at issue here was reciprocal, covering not only claims that Callahan might make against Atkinson but also claims that Atkinson might make against Callahan. Callahan Motion at 6-7.

In *Butters*, the wife and passenger in a car driven by her husband sued the driver of a second vehicle involved in an accident; the second driver in turn asserted a third-party claim against the husband. 347 A.2d at 602-03. The defendant paid a sum in settlement to the wife and the wife and husband executed a release of the second driver "from any and all claims, demands, damages, actions, causes of

[11] Counsel for Weeks has filed a document entitled "Defendant Weeks Marine, Inc.'s Response to Fourth Party Defendant Callahan Bros. LLC's Motion for Summary Judgment Against Fourth Party Plaintiff Atkinson" (Docket No. 62). Weeks is not a party to this motion and has no standing to submit a "response" to it. If counsel for Weeks wished to invoke arguments raised by Atkinson with respect to this motion in support of his client's position on the motion for summary judgment brought against his client by Atkinson, as is suggested by the brief body of the "response," the only available means to do so would be a motion for leave to file a surreply with respect to that motion. The document that is (*continued on next page*)

action or suits of any kind or nature whatsoever." *Id*. at 603. The third-party claim went to trial; the husband pleaded the release as a bar and the court entered judgment n.o.v. on this basis. *Id*. The Law Court observed that other jurisdictions had held

> that the making of the original settlement without any express reservation of rights by the settlor constitutes a complete accord and satisfaction of all claims of the immediate parties to the settlement arising out of the same accident.

*Id*. at 604. It went on to hold as follows:

> We declare the rule in Maine to be that the making of a settlement without any express reservation of rights constitutes complete accord and satisfaction of all claims of immediate parties to the settlement arising out of the same accident.

*Id.* In *Cyr v. Cyr*, 560 A.2d 1083 (Me. 1989), the Law Court held that the *Butters* rule "is in no way peculiar to accident cases," *id*. at 1083, and applied it to the settlement of a lawsuit for misrepresentation and breach of warranty, *id*. at 1083-84. The court added:

> To be sure, there are circumstances in which parties with claims against one another might rationally choose to settle one that is relatively cut and dried while going forward with the litigation of a potentially offsetting but disputed claim. Thus, a general release may expressly reserve the releasee's right to proceed against the releasor. But in the absence of any express reservation of rights, there is only one natural inference that can be drawn when one party has bargained for and accepted the other party's release of all claims arising from a specific transaction or occurrence: implicit in the bargain of accord and satisfaction is a reciprocal release, by the party who has procured the express release, of any claims inconsistent with the settlement effected by the release.

*Id*. at 1084 (citation omitted). It also noted that cases might be presented in which a dispute of material fact could exist as to the scope of the implied discharge given by the releasee. *Id*.

Contrary to Callahan's position, these opinions cannot reasonably be interpreted to apply to releases executed in circumstances other than the settlement of litigation. To adopt Callahan's view would

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Docket No. 62 is stricken.

be to import reciprocity into every release document that does not include an explicit reservation of rights by the releasee. Nothing in the summary judgment record suggests that Atkinson and Callahan were engaged in a dispute of any kind when the release at issue was executed. The release was executed in return for "compensation for certain work performed under the . . . subcontract." Callahan SMF ¶ 5; Atkinson Responsive SMF ¶ 5. The Law Court characterized the release and settlement documents in *Butters* and *Cyr* as accords and satisfactions. 347 A.2d at 604; 560 A.2d at 1083. "An accord is a contract under which an obligee promises to accept a substituted performance in future satisfaction of the obligor's duty." *E.S. Herrick Co. v. Maine Wild Blueberry Co.*, 670 A.2d 944, 946 (Me. 1996) (citations, emphasis and internal quotation marks omitted). The known circumstances and nature of the release at issue here do not fit within that definition.

Callahan is not entitled to summary judgment on the sole ground it asserts.

## IV. Conclusion

For the foregoing reasons,

(i) leave to withdraw Count IV of the amended complaint (Docket No. 19) is **GRANTED**; and

(ii) I recommend that all of the pending motions for summary judgment (Docket Nos. 26, 31, 37 and 51) be **DENIED**.

## ***NOTICE***

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

Dated this 9th day of January, 2004.

David M. Cohen
United States Magistrate Judge

**Plaintiff**

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V.

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V.

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**ThirdParty Plaintiff**
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